FAREK UREP & ORS v. EHSAN BINA SDN BHD & ANOR

COURT OF APPEAL, PUTRAJAYA
PRASAD SANDOSHAM ABRAHAM JCA
ZABARIAH MOHD YUSOF JCA
ASMABI MOHAMAD JCA
[CIVIL APPEAL NO: B-02(A)-284-02-2016]
6 DECEMBER 2016

LAND LAW: *Possession – Recovery of – Application under O. 89 Rules of Court 2012 – Whether appellants trespassers simpliciter – Whether appellants occupied lands with consent of respondents' predecessors in title – Whether summary procedure under O. 89 Rules of Court 2012 available – Triable issues – Whether raised – Whether appellants came within specialised categories of persons envisaged by O. 89 r. 1 Rules of Court 2012*

CIVIL PROCEDURE: *Originating summons – Application for – Delivery of vacant possession – Whether appellants trespassers simpliciter – Whether appellants occupied lands with consent of respondents' predecessors in title – Whether summary procedure under O. 89 Rules of Court 2012 available – Triable issues – Whether raised – Whether appellants came within specialised categories of persons envisaged by O. 89 r. 1 Rules of Court 2012*

The respondents were the registered owners of two pieces of lands ('the said lands') pursuant to two sale and purchase agreements. The respondents filed an originating summons pursuant to O. 89 of the Rules of Court 2012 ('ROC') for the appellants to deliver vacant possession of the said lands on the basis that the appellants had been occupying the said lands without the consent of the respondents and the appellants were trespassers *simpliciter*. The appellants, however, contended that they had been occupying the said lands since the early 1970s originally through written tenancies entered into between the appellants and the respondents' predecessors in title commencing back to the early 1970s, and had been occupying the said lands uninterrupted. The High Court allowed the respondents' application and hence, this appeal to the Court of Appeal.

Held (allowing appeal)
Per Prasad Sandosham Abraham JCA delivering the judgment of the court:

(1) The point to be emphasised here was not that the respondents being the registered proprietor of the said lands were entitled to possession of the same or not. It was whether the summary procedure under O. 89 of the ROC was available based on the given facts. The appellants had demonstrated an arguable case that they could occupy the said lands with the acquiescence of the predecessors in title of the respondents and raised several triable issues which were not apt to be dealt with under O. 89. Thus, the appellants did not come within the specialised categories of persons that O. 89 r. 1 of the ROC 2012 envisages. (paras 7-9)

Bahasa Malaysia *Headnotes*

Menurut dua perjanjian jual beli, responden-responden adalah pemilik berdaftar dua bidang tanah ('tanah-tanah tersebut'). Responden-responden memfailkan saman pemula di bawah A. 89 Kaedah-Kaedah Mahkamah 2012 ('KKM') agar perayu-perayu menyerahkan milikan kosong tanah-tanah tersebut atas dasar perayu-perayu menduduki tanah-tanah tersebut tanpa kebenaran responden-responden dan perayu-perayu adalah penceroboh. Perayu-perayu, walau bagaimanapun, menghujahkan bahawa mereka menduduki tanah-tanah tersebut sejak awal tahun 1970-an yang pada asalnya melalui sewaan bertulis yang dimasuki antara pendahulu hak milik perayu-perayu dan responden-responden bermula dari awal 1970-an, dan telah menduduki tanah-tanah tersebut tanpa gangguan. Mahkamah Tinggi membenarkan permohonan responden-responden dan oleh itu, rayuan ini ke Mahkamah Rayuan.

Diputuskan (membenarkan rayuan)
Oleh Prasad Sandosham Abraham HMR menyampaikan penghakiman mahkamah:

(1) Perkara yang perlu dititikberatkan di sini bukanlah bahawa responden-responden sebagai tuan punya berdaftar tanah-tanah tersebut berhak ke atas milikan atau tidak. Ia adalah sama ada prosedur terus di bawah A. 89 KKM boleh diperolehi berdasarkan fakta yang ada. Perayu-perayu telah mengemukakan kes yang boleh dipertikaikan bahawa mereka boleh menduduki tanah-tanah tersebut dengan persetujuan pendahulu hak milik responden dan membangkitkan beberapa isu yang tidak sesuai untuk ditangani di bawah A. 89. Oleh itu, perayu-perayu tidak terangkum dalam kategori khusus seperti yang dijangka oleh A. 89 k. 1 KKM.

Case(s) referred to:
Bohari Taib & Ors v. Pengarah Tanah & Galian Selangor [1991] 1 CLJ 647; [1991] 1 CLJ (Rep) 48 SC ***(foll)***

Legislation referred to:
Rules of Court 2012, O. 89 r. 1

For the appellants - Venu Nair & Khamshah; M/s Khamshah & Partners
For the respondents - KF Ee & SP Lai; M/s KF Ee & Co

[Editor's note: Appeal from High Court, Shah Alam; Originating Summons No: 24-46-01-2015 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Prasad Sandosham Abraham JCA:

[1] We heard this appeal on 1 June 2016 and disposed of the appeal by allowing the same and setting aside the order of the High Court with liberty to parties to apply. We now append below our grounds for allowing the same.

[2] The respondents are the registered owners of two pieces of lands held under GM113, Lot 1416, Mukim Bukit Raja, Daerah Petaling, Negeri Selangor (hereinafter referred to as "the said lands") pursuant to two sale and purchase agreements dated 21 June 2012 (see pp. 49 and 59 record of appeal ("RR") bahagian B). The appellants contend in fact that they have been occupying the said lands since the early 1970s originally through written tenancies entered into between the appellants and the respondents' predecessors in title commencing back to early 1970s, and have been occupying the said lands uninterrupted.

[3] The respondents filed an originating summons (encl. 1) pursuant to O. 89 of the Rules of Court 2012 for the appellants to deliver vacant possession of the said lands on the basis the appellants have been occupying the said land without the consent of the respondents and the appellants are trespassers *simpliciter* (see pp. 48-59 RR bahagian B). The High Court allowed the respondents' application, hence this appeal to the Court of Appeal.

[4] We allowed the appeal and set aside the order of the High Court for the following reasons. Order 89 clearly envisages that the appellant must be a person or persons who entered into or remained in occupation of the said land without the consent or license of the predecessors in title of the respondents.

[5] The appellants contend that the appellants occupied the said lands originally through tenancies and thereafter with the consent of the respondents' predecessors in title. They had in fact been in occupation of the said lands since their grandparents' time, since early 1970s. (see pp. 314-332 RR bahagian C jilid 1 & pp. 60-85 RR bahagian B).

[6] The appellants with the consent of the predecessors in title of the respondents had given written consent to the residents of the said lands to apply for water supply (pp. 333-334 RR bahagian C jilid 1; see also exh. "FBMU 3" pp. 335-370 RR bahagian C jilid 1).

[7] It is our considered view that the appellants do not come within the category of the specialised categories of persons that O. 89 r. 1 of the Rules of Court 2012 envisages. We refer to the case of *Bohari Taib & Ors v. Pengarah Tanah & Galian Selangor* [1991] 1 CLJ 647; [1991] 1 CLJ (Rep) 48; [1991] 1 MLJ 343 a decision of the Supreme Court wherein it was held:

> (3) For the purpose of the summary procedure under O. 89 a distinction should be made between squatters' *simpliciter* who have no rights whatsoever and occupiers with licence or consent, as well as tenants and licensees holding over.

and we quote from the judgment of Azmi SCJ as follows:

> In our view, the appellants in this particular case have sufficiently shown by affidavit evidence that they have an arguable case in that they and some, if not all, of the other farmers have occupied the land for three years under licence and thereafter have remained in occupation with the

A continued consent of the state government by virtue of the 1980 alienation already approved prior to the TOLs. The learned State Legal Adviser Encik Hishamuddin for the respondent pointed out that the TOLs and therefore consent were given only up to 1983. After that, no TOL was issued, thus indicating absence of consent. In our view, the alleged continued consent of the state government to their occupation
B notwithstanding the expiry of the TOLs, is one of the serious issues to be tried. The case for the appellants is that they were already in occupation with consent prior to 1981 and the grant of TOLs from 1981 to 1983 is merely part of the chain of events supporting the existence of an approval of alienation of the lands to them by the state authority under s. 42 of the National Land Code 1965, and pending issue of titles under
C s. 77(2) they are entitled to remain on the land not as squatters but as of right. The approval of the state authority as exhibited by the appellants would appear to have been made on 4 September 1980, according to the letter of the Collector of Sabak Bernam dated 25 October. The opening paragraph of the letter at p. 95 of the appeal record reads:

D > Merujuk kepada perkara tersebut di atas, dimaklumkan bahawa permohonan tuan/puan ke atas tanah di Rancangan tersebut di atas telah diluluskan oleh Majlis Mesyuarat Kerajaan Negeri pada 4 September 1980.

We are therefore of the opinion that there are issues to be tried in this
E case which are not suitable to be decided by affidavit evidence. We accordingly agree that this case should not be dealt with summarily under O. 89. Counsel for the appellants had rightly referred to the position of licensees holding over as distinct from squatters in the following judgment of Lawton J in *McPhail v. Persons, Names Unknown* [1973] 3 All ER 393 at p. 401:

F > It follows, in my judgment that squatters were never able to enlist the aid of the Court of Chancery to resist a writ of possession and they cannot now. The position of tenants and licensees holding over may be different. I have not thought it necessary to consider the jurisdiction of the court of stay execution in such cases.

G **[8]** The point to be emphasised here is not that the respondents being the registered proprietor of the said lands are entitled to possession of the same or not, it is whether the summary procedure under O. 89 is available based on the given facts.

H **[9]** It is our view that the appellants had demonstrated an arguable case that they could occupy the said lands with the acquiescence of the predecessors in title of the respondents and raised several triable issues which were not apt to be dealt with under O. 89 of the Rules of Court 2012. We therefore allowed the appeal with costs of RM5,000 and deposit to be refunded to the appellants.

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